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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1217

DALE C. RICHARDSON,

Petitioner,

vs.

COMMUNICATION WORKERS OF AMERICA, AFL-CIO, AND LOCAL 7495, COMMUNICATION WORKERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The relevant opinions in the courts below are referred to in the petition at page 2, and are set forth in appendices to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Does the grant of a motion for new trial on a claim five years after the initial filing of a suit, where the claim was first recognized in the appeal in the same case seven months before the grant and the first trial of the claim was five months before the grant, deny the plaintiff due process of law?

2. Where a motion in the alternative for remittitur, judgment notwithstanding the verdict, and new trial assigns as one of the grounds for relief the excessiveness of the verdict, and the trial court grants a new trial because the verdict was excessive "as a result of passion, prejudice, mistake or some other improper reason", has the trial court granted the motion for new trial on a grounds not stated in the motion so as to require compliance with Rule 59(d) of the Federal Rules of Civil Procedure?

3. Where the trial court grants a motion for new trial for a reason other than stated in the moving party's motion, is compliance with Rule 59(d) a jurisdictional prerequisite to the valid entry of such order?

4. In a multiple claim case is the absence of "an express determination that there is no just reason for delay" prior to the entry of judgment fatal to the jurisdiction of the Court of Appeals under 28 U. S. C. § 1291 because the absence of such certificate renders the judgment nonfinal?

5. May a Court of Appeals consistently with the Federal Rules of Appellate Procedure adopt a practice

whereby it screens appeals in advance of the time of oral argument and does not allow oral argument in those cases in which the Court believes that oral argument would not be an aid to the ultimate determination of the appeal?

STATEMENT

This case involves a suit by a former employee against his employer, the Western Electric Company, which has now settled out of the case, and the bargaining agent of the employees of Western Electric, the Communication Workers of America and Local 7495 of the Communication Workers of America, the Local at the Western Electric works in Omaha at which Richardson had been employed prior to his discharge. The suit is brought pursuant to § 301 of the Labor Management Relations Act, 29 U. S. C. § 185.

The suit was originally filed on December 21, 1966. In his original complaint Richardson sued for breach of contract. He included in his complaint for breach of contract allegations with regard to the infliction of mental distress upon him. Because the suit was for breach of contract, the trial court applied the ordinary contract rule that in an employee's suit for breach of contract damages are measured by the term of the contract, 11 Williston, Contracts 3rd, § 1358, p. 301; *Sullivan v. David City Bank*, 181 Neb. 395, 148 N. W. 2d 844, 846 (1967). Since federal jurisdiction was bottomed on the claim for breach of contract, and since the ordinary rule

is that damages for mental anguish are not allowed in contract, 11 Williston, op sit. § 1341, p. 214; Dobbs, Remedies, § 12.4, p. 819, the trial court treated the claim for mental anguish as a pendant state law claim and exercised his jurisdiction to dismiss it so that it could be filed in state court. Richardson took no action to assert in the state courts of Nebraska, a common law tort claim. Rather, he awaited the judgment which he eventually obtained in the District Court on the contract cause of action, and then appealed alleging that the judgment was insufficient.

At the first trial, the jury found that the Unions would not have fairly represented Richardson in a grievance procedure after he was terminated had he requested them to do so, that the two Unions had violated the contract provision against discrimination against non-Union members, that Richardson's discharge from his employment at Western Electric was wrongful, and that the discharge was proximately caused by the actions of both the International and the Local Union. The jury awarded Richardson damages of $20,000, which were eventually limited by the trial court to $1,500 because of the expiration date of the collective bargaining agreement.

Judgment was entered for Richardson on April 15, 1970, and he appealed to the Court of Appeals. Even in the Court of Appeals, Richardson still continued to argue that the damages for mental anguish were properly recoverable as part of an action for breach of contract.

On appeal, the Eighth Circuit rejected the limitation of damages for wrongful discharge to the period of the collective bargaining agreement. It held that seniority

was a contract right which survived the term of the contract. In so holding, the Court followed the now overruled Second Circuit decision in *Zdanok v. Glidden Company*, 288 F. 2d 99 (2nd Cir. 1971), affirmed on other grounds, 370 U. S. 530 (1962); see *Local 1251 UAW v. Robert Shaw Controls Company*, 405 F. 2d 29 (2nd Cir. 1968) (en banc). With regard to the claim for damages for mental anguish, the Court noted that Richardson had erred in treating his claim against the Unions as a claim for breach of contract. The Court categorized the claim as analogous to a claim for breach of fiduciary duty, and held that damages for mental anguish could be allowed by analogy to the parasitic recovery of damages for mental anguish in intentional tort cases, see Prosser, Torts 4th, p. 52, even though such damages are not generally recoverable in cases involving economic torts, *Harsh v. Czyz*, 157 Neb. 699, 61 N. W. 2d 265, 272 (1953). On the claim for damages for lost employment, the Court of Appeals treated the liability of Western Electric and each Union as established and limited the retrial to the issue to the amount of damages and their appropriate allocation among the parties. In addition, the Court authorized Richardson to file a second claim against the Unions for mental distress. *Richardson v. Communication Workers of America*, 443 F. 2d 974 (8th Cir. 1971).

The Court of Appeals reversed the District Court on June 4, 1971. Richardson filed an amended complaint. The complaint stated two claims. The first claim against both the employer and the Unions for wrongful discharge, and the second claim against only the Unions for mental anguish. The trial commenced in early September and

the jury returned its verdict on September 16th. The case was submitted to the jury on special interrogatories, and it found for Richardson on both claims. On the first claim it awarded Richardson $92,000 in damages apportioned thirty percent to Western Electric and seventy percent to the two Unions. Upon Richardson's second claim, the jury awarded him $250,000. Because the verdict was on special interrogatories, entry of judgment did not follow as of course under Rule 58 of the Federal Rules of Civil Procedure.

On October 8, 1971, prior to the entry of any judgment, the Unions moved for remittitur, judgment notwithstanding the verdict or in the alternative for new trial. The trial court heard oral argument on the Unions' motion for new trial in November of 1971. The motion for new trial was ruled on on February 29, 1972, after a grant to Richardson of additional time to file a memorandum brief on the motion for new trial. The Unions were denied a new trial as to Richardson's first claim, but a new trial was granted as to the second claim. The trial court ended its opinion on the motions for new trial with the direction that "a judgment will be entered". In conformity with this direction, the Clerk entered a judgment.

The two Unions took an appeal from the judgment on the first claim. Richardson appealed from the grant of the new trial. The Court of Appeals for the Eighth Circuit dismissed the appeal of the two Unions because the order from which they appealed was not yet final, since it was a judgment on a single claim in a multiple claim action, and the certificate of no just reason for delay required by Rule 54(b) of the Federal Rules of

Civil Procedure had not been made. The Court of Appeals dismissed Richardson's appeal because it was an appeal from an order granting a new trial, which is a non-final order. *Richardson v. Communication Workers of America*, 469 F. 2d 333 (8th Cir. 1972).

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ARGUMENT

Richardson is attempting an appeal from an order granting a new trial. The Court of Appeals has no jurisdiction over such an appeal. It properly dismissed the appeal.

This is an appeal from an order granting a new trial. Under § 1291 of Title 28 U. S. C., the Court of Appeals has jurisdiction only over an appeal from a "final" order. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U. S. 229, 233 (1945). The grant of a motion for new trial does not terminate the litigation. Rather, the "granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed." *Phillips v. Negley*, 117 U. S. 665, 671 (1886). Since the grant of a new trial does not terminate the litigation, but rather eliminates the judgment, the grant of a new trial is not a final order and is not appealable when made, *Cincinnati Street Railway Company v. Snell*, 179 U. S. 395, 397 (1900); *Laclede Gas Light Company v. Public Service Commission of Missouri*, 304 U. S. 398 (1938).

Because this was an appeal from an order granting a new trial, the Eighth Circuit properly held that:

> "After full consideration the court finds that it lacks jurisdiction to review the matters before it. It has long been settled that the granting of a new trial is not an appealable order. 6A Moore, Federal Practice & Procedure, § 59.9(4) at 3853-3854 (1971). The granting of the new trial may be challenged on abuse of discretion in an appeal only from the final judgment. See Gallon v. Lloyd-Thomas Company, 261 F. 2d 26, 27-28 (8th Cir. 1958)." 469 F. 2d 334.

Richardson attempts to escape the rule that a grant of a new motion for new trial is not an appealable order on three alternative grounds. First, Richardson attempts to invoke the exception to this rule recognized in *Phillips v. Negley,* supra, that where the trial court lacks jurisdiction to grant the new trial, the order granting the new trial is appealable. He argues (a) that the grant of the new trial was void since it amounted to a denial of due process, and (b) that the District Court was without jurisdiction since it failed to comply with Rule 59(d) of the Federal Rules of Civil Procedure. Alternatively, Richardson attempts to bring this case within the doctrine of *Cohn v. Beneficial Loan Corporation,* 337 U. S. 541 (1949). He argues (c) that the Court of Appeals has jurisdiction under Rule 54(b) of the Federal Rules of Civil Procedure to review the Unions' appeal from the judgment on the first cause of action, and that his appeal from the grant of the new trial on the second cause of action should be reviewed along with the judgment on the first cause of action. Finally, Richardson argues (d) that without regard to the merits of the decision of the

Eighth Circuit, the case should be remanded to the Eighth Circuit for the hearing of oral arguments, since Rule 6 of the Eighth Circuit under which oral argument was denied in this case is invalid as in conflict with Rule 34 of the Federal Rules of Appellate Procedure. We deal with these arguments in sequence, and demonstrate that none of them is correct.

A.

The grant of a motion for new trial on a claim five years after filing of suit, where that claim was first recognized in an appeal in the same case seven months before the grant, and the first trial of the claim was five months before the grant, does not deny a plaintiff due process.

Richardson contends, Petition for Certiorari No. 72-1217, pp. 8-11, that the grant of the motion for new trial in this case was a denial of due process. The jist of this argument is that because of the time that has elapsed in this case, Richardson is entitled to any jury verdict he received without regard to the ordinary right of a federal judge to grant a new trial for excessiveness of the verdict, and without regard to the ordinary right of the defendant to move for a new trial on the grounds that legal error has occurred. Under Richardson's view, the grant of the new trial was unconstitutional without regard to its merits.[1] In addition, if the full logic of the

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[1] The new trial, as we demonstrate infra, page 15, was granted on the grounds of excessiveness of the verdict. In a state where the high-

(Continued on following page)

argument is accepted, the Unions apparently would be debarred of any appeal in which they sought a new trial on the grounds advanced in their motion, but rejected by the District Court, since it is the grant of the new trial without regard to its merits which constitutes the denial of due process.[2]

Richardson cites no authority for this novel argument; nor do we know of any. While the course of these proceedings has been elongated, they have been tried under the ordinary rules applicable to civil litigation in

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(Continued from previous page)

est reported personal injury verdict, and probably one of the highest personal injury verdicts ever returned, is $325,000, **Kohler v. Ford Motor Company,** 187 Neb. 451, 191 N. W. 2d 600 (1971), it is not surprising that the trial judge regarded a $250,000 verdict for mental anguish unaccompanied by any physical injury as excessive.

2 The trial court instructed the jury upon the basis that the mere relationship of International Union and Local created an agency relationship as a matter of law. The federal courts have uniformly held that such a relationship does not exist as a matter of law, but rather, only exists when upon the application of ordinary agency principles, a finding of agency would otherwise be justified. **N. L. R. B. v. International Longshoremens Union,** 283 F. 2d 558 (9th Cir., 1960); **Barefoot v. International Brotherhood of Teamsters,** 424 F. 2d 1001 (10th Cir. 1970); **Harnischfeger Corporation v. Sheet Metal Workers International Association,** 436 F. 2d 351 (6th Cir. 1970). In addition to this error in the instructions, the trial court allowed Richardson's counsel to make a Golden Rule argument. The federal courts have uniformly held that the allowance of such an argument is prejudicial error, **F. W. Woolworth Company v. Wilson,** 74 F. 2d 439, 442 (5th Cir. 1934); **Chicago & Northwestern Railroad Company v. Kelly,** 84 F. 2d 569, 576 (8th Cir. 1936); **Klotz v. Sears, Roebuck & Company** 267 F. 2d 53 (7th Cir. 1969); **Johnson v. Colglazier,** 348 F. 2d 420 425 (5th Cir. 1965); **Shroyer v. Kaufman,** 426 F. 2d 1032, 1033-103 (7th Cir. 1970); see further **Anno: Argument-Taking Position of Litigant,** 70 ALR 2d 935. In their motion for new trial, the Unions argued that both of these legal errors would have justified the grant of a new trial.

federal courts. While the delay may have been long, it is not the product of a deliberate effort on the part of the federal judiciary to prevent Richardson from receiving any relief, see *Smith v. Illinois Bell Telephone Company*, 270 U. S. 587, 591-592 (1926). So long as motions for new trial and appellate review are provided for delay, and sometimes even inordinant delay, may occur. However, unless the jury at some point in time is to be vested with absolute and unfettered discretion, and unless errors at trial, however egregious become unreviewable, delays such as this will sometimes occur. Such delay with its attendant expense, while unfortunate, does not constitute a denial of due process. See *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 51-52 (1938); *Younger v. Harris*, 401 U. S. 37, 46 (1971). "The expense and woe of litigation are risks to which whatever the modes of justice—and though one may win in the end—we are all subject." Jaffe, Judicial Control of Administrative Action, p. 428.

Richardson bottoms his due process argument on the position that the delay in this case is no wise a product of any action on his part. That view is a distortion of the record. The trial court entered judgment for Richardson in the first trial on April 15, 1970. The Court of Appeals reversed the District Court on June 4, 1971. Both the abortive character of the first trial, and the more than the year delay attendant on the appeal from the judgment in the first trial, were products, at least in part, of the initial pleading error which Richardson's counsel made when he filed his suit as a suit for breach of contract. Upon remand, the District Court commenced

the trial in early September of 1971 and verdict was returned by September 16th. The trial court heard oral argument on the Unions' motion for new trial in November of 1971. The motion for new trial was finally ruled on on February 29, 1972, after a grant to Richardson of additional time to file a memorandum brief on the motion for new trial. The delay from February 29, 1972 to date has been involved in Richardson's attempt to appeal from the grant of the motion for new trial. Thus, while this case has been delayed six years, the non-submission of the issue of damages for mental anguish to the jury in the first case was largely a product of a pleading error which Richardson's counsel made. In addition, more than two and one-half years of the delay has been consumed in appeals which Richardson has taken.

Unless the rule is that plaintiffs may appeal from any order which dissatisfies them, but defendants are debarred from seeking relief from verdicts and judgments, we fail to see a denial of due process to Richardson here. Moreover, the two basic reasons which Richardson gives for believing that delay is a denial of due process, the mounting expenses of litigation and the fading memories of witnesses, affect defendants at least as much as plaintiffs. Richardson's position is that the grant of new trial is void without regard to its merits as a denial of due process. We submit, that if expense and delay are to form the basis for a rule that litigation must be terminated, it would be equally logical to hold that if Richardson has not been able to obtain a jury verdict uninfected by error in seven years, the defendants are entitled to a dismissal on the grounds that the

delay is a denial of due process as to them. Since Richardson is not paying any of his own litigation expenses, Petition for Certiorari No. 72-1217, p. 8, and since the judgment for mental anguish is not designed to compensate Richardson for any sums which he is out-of-pocket and has already expended, it would seem that the burden of delay lays at least as heavily upon the Unions as it does upon Richardson.

Richardson makes no suggestion as to how a rule could be crafted which would sort out cases in which delay is a burden to the plaintiff and cases in which delay is a burden to the defendant. Nor does Richardson show how such a due process rule could be formed in favor of the plaintiff without impeding the rights of the defendant. The Due Process Clause of the Fifth Amendment is not a sufficiently refined tool to be utilized in formulating rules to expedite litigation in the federal courts.

In aid of his argument Richardson cites language from *County of Allegheny v. Frank Mashuda Co.*, 360 U. S. 185, 196 (1959), that speaks of "that promptness of decision which in all judicial actions is one of the elements of justice." One of the purposes of the final judgment rule "is elimination of delay caused by interlocutory appeals." *Catlin v. United States*, supra, 324 U. S. 234. This case demonstrates that in the main "promptness of decision" is best assured by not reviewing interlocutory orders. The year and a half consumed by Richardson's appeal from the grant of the new trial would have been an ample period of time within which to retry the second claim and to take an appeal to the Eighth

Circuit. Richardson's efforts to appeal from a patently nonappealable order have had no other effect than to deny him the prompt justice, which he seeks. The decision of the Court of Appeals should be affirmed, so that the second claim may be retried.[3]

B.

The District Court acted within its jurisdiction when it granted the new trial. The new trial was granted for reasons stated in the motion for new trial filed by the two Unions. In any event, compliance with Rule 59(d) is not jurisdictional.

In his petition for certiorari, Richardson argues that the grant of a new trial is reviewable here because the District Court proceeded in excess of its jurisdiction, Petition for Certiorari No. 72-1217, pp. 11-17. The prem-

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3 Richardson claims that the grant of the new trial here is a product of the trial judge's antipathy to claims for mental anguish and that unless the grant of the new trial is reviewed now the trial judge will never allow a judgment for damages for mental anguish to become final. Both of these arguments are far fetched. The trial judge has demonstrated no antipathy to damages for mental anguish. He refused to allow the issue of mental anguish to go to the jury in the first trial because Richardson had sued for breach of contract, and damages for mental anguish are not generally allowed in contract actions, 11 Williston, Contracts 3rd, § 1341, p. 214; Dobbs, Remedies, § 12.4, p. 819. When the jury returned its verdict on the second cause of action in the second trial, the trial judge set that award aside, not because he believed that no damages were warranted, but because he believed that an award of $250,000 was excessive. In any event, should the trial court abuse its power to grant new trials and persistently deny Richardson judgment in the face of a second substantial jury award for mental anguish, Richardson has adequate protection against such an abuse of judicial discretion, see 28 U. S. C. § 1651; 6A Moore, Federal Practice, § 59.15(2), pp. 3898-3901; Wright, Federal Courts 2d § 95, p. 421.

ises for this argument is that the District Court did not comply with Rule 59(d) of the Federal Rules of Civil Procedure. The noncompliance is alleged to be a failure to specify the grounds for the grant of the new trial and a failure to hold a hearing prior to the grant of the new trial. Rule 59(d) only applies when the District Court grants a new trial on its own motion or when the District Court grants a new trial for a reason not stated in a moving party's motion. Here the motion for new trial was granted on grounds stated in the moving parties' motion. In any event, compliance with Rule 59(d) is not jurisdictional.

The Unions made a motion for new trial on October 8, 1971. Among the specifications in the two Unions' motion for new trial were the following:

> "II. The damages awarded by the jury were so excessive as to clearly establish they resulted from factors not admitted in evidence. . . . XI. That the damages allowed by the jury in both causes of action were not sustained by the evidence and are contrary to the charge of the court as to the measure thereof. . . . XIII. That as to the verdict on the second cause of action, the amount of damages awarded was punitive, exemplary and excessive. That the plaintiff's counsel was permitted to argue exemplary damages even though the instruction of the court stated that punitive and exemplary damages would not be permitted in the jury's verdict."

In his opinion granting the motion for new trial on the second cause of action, the District Judge stated:

> ". . . The subject of mental suffering is by necessity an abstract subject and it cannot be expected that damages can be computed with mathematical

> certainty, and the court would not interfere if it were not of the firm opinion that the jury disregarded the evidence or the rules of law and rendered its verdict as a result of passion, prejudice, mistake or some other improper reason. . . ."

Later in the opinion, the trial judge added that:

> ". . . It is clear that the verdict was excessive and intended to punish the defendant or resulted from some other improper reason. Yet the court does not view the facts such that it would be proper to sustain a motion for remittitur because there is no way to effectively separate the proper elements of damages from those attributed to improper reasons. Thus a new trial on the issue of mental distress, anguish or humiliation will be ordered."

The motion for new trial filed by the Unions was bottomed on the premise that the damages awarded on the second cause of action were well beyond any award that would have been proper to compensate Richardson for mental anguish. The trial court agreed with this position and sustained the motion. The argument that the trial court granted the motion "for a reason not stated in the motion" so that the requirement of "notice and opportunity to be heard" on this new ground would attach under Rule 59(d) is erroneous. The grounds of the grant were contained in the Unions' motion for new trial upon which the plaintiff had already been heard. No new specifications of grounds or new hearing was required from the trial court.

Richardson attempts to differentiate the grounds upon which the trial court based its decision from those in the motion because the trial court used the phrase

"passion, prejudice" in its opinion.[4] However, this phrase appears as the first in a list of possible reasons for the excessiveness of the verdict. A fair reading of the trial court's memorandum demonstrates that a new trial was ordered because the verdict was excessive. On these facts, the counsel of the Advisory Committee at the time at which it proposed the language in Rule 59(d) involved here should be controlling:

> "In considering whether a given ground has or has not been advanced in the motion made by the party, it should be borne in mind that the particularity called for in stating the grounds for a new trial motion is the same as the requirement for all motions by Rule 7(b) (1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on."

The motion made by the Unions gave the counsel for Richardson "a fair indication . . . of the substance of the

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[4] Richardson makes much of a supposed division of authority as to whether or not passion or prejudice may be inferred from the size of the verdict alone, Petition for Certiorari No. 72-1217, pp. 13-15. However, even if this conflict exists, it is irrelevant here. The conflict, as the authorities cited by Richardson demonstrate, is a conflict with regard to the standards which a Court of Appeals should apply in reviewing a trial court's denial of a motion for new trial, where it is claimed that the denial was an abuse of discretion because the verdict was excessive, see 6A Moore, Federal Practice, § 59.08(6) pp. 3829-3830; 3 Barron & Holtzoff, Federal Practice and Procedure (Wright Ed.), § 1302.1, pp. 348-350. It has nothing to do with the right of the District Court to grant a motion for new trial, which he may do without regard to the presence or absence of passion or prejudice, whenever he believes that the verdict is excessive, see Wright, Federal Courts 2d, § 95 p. 420.

grounds relied on." The trial court acted upon those grounds.[5]

Even if the District Court failed to comply with Rule 59(d), noncompliance with that rule is not a jurisdictional defect. Rule 59(d) was amended in 1966 in order to overturn a line of cases such as *Fried v. McGrath*, 133 F. 2d 350 (D. C. Cir. 1942), which had held that the grant of a new trial more than ten days after judgment, even though one of the parties had moved for

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5 Richardson attaches such significance to the words "passion, prejudice" because he believes that remittitur or partial new trial was denied because of a finding of passion or prejudice, Petition for Certiorari No. 72-1217, p. 16. It is true that a remittitur or partial new trial limited to the issue of damages cannot be granted where a verdict is set aside on the grounds that it was a product of passion or prejudice, **Minneapolis, St. Paul and Saulte Ste. M. Railway Company v. Moquin**, 283 U. S. 529 (1931). However, the trial judge did not find the verdict was the product of passion or prejudice, but only that it was excessive. He denied a remittitur because the verdict was so large the proper award could not be severed from the improper parts of the award. Nor, while the trial court does not specifically discuss the issue, would a partial new trial limited to the issue of damages have been possible here. The issue of liability and the issue of damages are inextricably interwoven on Richardson's second cause of action. His claim for mental anguish involved a course of conduct by a large number of individuals over a seven month period. In determining the amount of Richardson's damages, it was necessary for the jury to determine as to each particular act of harrassment whether either the Local or the International was liable for it under the principle of respondeat superior. While the jury in the second trial made a general finding of liability for mental anguish, that finding would be of no aid to a jury in a second trial, since it would still be necessary to separately determine liability as to the individual acts before allowing damages for the anguish which they may have caused. In these circumstances, a partial new trial limited to the issue of damages would have been improper, **Gasoline Products Company v. Champlin Refining Company**, 283 U. S. 494, 500-501 (1931).

a new trial, was void if granted for a reason not stated in the pending motion.

> "The cases by their rigidity had become merely an obstacle to just decision; the beam surely tipped in favor of some remedy." Kaplan, Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (II), 81 Harvard Law Review, 598, 693.

The remedy adopted was to allow the trial court, if a timely motion was filed, to grant a new trial for reasons not stated in the motion beyond the ten days in which the court might otherwise act upon its own motion. Kaplan, op sit., 81 Harvard Law Review 604.

With this background, it would be strange to hold that the rule had removed one jurisdictional rigidity only to supplant it with another. But Richardson argues that the notice and hearing provided for in Rule 59(d) should be treated as jurisdictional. To so hold would merely insert a new obstacle to just adjudication in the place of another. As Kaplan argues:

> ". . . The final text adds the point that before the court grants a motion for a reason not stated therein, it should give the parties notice and a chance to be heard It is not clear to me why this should appear uniquely in a rule on the new trial motion: if the idea of notifying the parties before doing something on a basis previously undiscussed or undisclosed is sound here, why should it not apply to the determination of all other motions, or other important motions? It has hitherto been left to the judges common sense and feeling for the particular situation. The provision should, I think be read as directive but not as conditioning effective action by

the judge; it will then be harmless and then perhaps marginally helpful." Kaplan, op sit., 81 Harvard Law Review, 604; cf. *Cherokee Laboratories, Inc. v. Pearson,* 415 F. 2d 85, 91 (10th Cir., 1969).

Richardson argues that the trial court's order granting the motion for new trial is reviewable for abuse of discretion, Petition for Certiorari No. 72-1217, pp. 17-18. We have no quarrel with this proposition. At the proper time, after a final judgment upon the second cause of action, the trial court's decision to grant a new trial is reviewable. If a second trial should produce a result less favorable to Richardson than the result he obtained on the first trial, he may, upon appeal, assert that the grant of a new trial was legally erroneous and seek the fruits of the jury verdict he obtained on the first trial. 3 Barron & Holtzoff, Federal Practice and Procedure (Wright Ed.), § 1302.1, pp. 346-347; *Altrichter v. Shell Oil Company,* 263 F. 2d 377, 379 (8th Cir. 1959). However, review must await the final judgment.[6]

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6 Richardson does not demonstrate the trial court abused its discretion. The trial judge may grant a motion for new trial whenever "the judge on the entire evidence is left with a definite and firm conviction that a mistake has been committed. . ." Wright, Federal Courts 2d, § 95, p. 420. In this case the trial judge was left with a definite and firm conviction that a mistake had been made. The sole question for a reviewing court is whether or not the trial judge abused his discretion in reaching that conviction and acting upon it. **Perry v. Bertsch,** 441 F. 2d 939, 943 (8th Cir. 1971). Abuse of discretion cannot be found here.

The verdict here is for $250,000. The course of conduct involved allegedly began in February and terminated in September, a period of seven months. It consisted in the main of the use of vile.

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C.

The Court of Appeals properly held that no final order had been entered on the first cause of action. In any event, even if the Unions' appeal on the first cause of action was properly taken, that would not make the order granting the new trial on the second cause of action appealable.

In the same order in which he granted a new trial on the second claim, the trial judge overruled the motion of the Unions for new trial on the first claim. He ended his opinion with a direction that "a judgment will be

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derrogatory epithets, either verbally to Richardson or posted upon signs around his place of work. On several occasions, Richardson's car was blocked on the company parking lot. The physical violence against Richardson consisted of throwing nuts and bolts and screws at him. In addition Richardson was involved in three fights. In the first fight with a man named Reeber, he threw the only punches. In a second incident at a water fountain, he pushed the other man. In the third fight, he was kicked. See, **Richardson v. Communication Workers of America,** 443 F. 2d 974, fn. 12 (8th Cir. 1971).

Richardson suffered no permanent physical injury as a result of these events. He suffered no temporary physical discomfort, which can unambiguously be related to these events. His only damage was mental anguish. The conduct occurred intermittently over seven months at work. The jury verdict of $250,000 for this mental anguish amounted to an award of approximately $35,715 per month for the anguish. Assuming twenty working days in a month, this amounted to an award of $1,785 per day for this anguish. Since the events took place at work and the work day is eight hours, this is an award of $223 an hour for mental anguish. The award of $223 an hour to Richardson for the discomfort involved in being insulted, hearing obscene epithets, and being in three fights is simply too large, or at least the trial judge could reasonably believe that it was too large, which is all that is required to prevent the order from being an abuse of discretion.

entered." In conformity with this direction, the Clerk entered a judgment. The two Unions took an appeal from this judgment. In the same opinion in which it dismissed Richardson's appeal, the Eighth Circuit also dismissed the Unions' appeal because the trial court had not made "an express determination that there is no just reason for delay" and directed the entry of judgment, as is required to finalize a judgment on a single claim in a multiple claim case under Rule 54(b) of the Federal Rules of Civil Procedure, *Richardson v. Communication Workers of America,* supra, 469 F. 2d 334-335. In dismissing the appeal for want of the express finding, the Court of Appeals followed the uniform holding that of the Courts of Appeals that the certificate is a prerequisite to appeal, since without it the judgment is not final. 6 Moore, Federal Practice, § 54.28(2), pp. 367-376, see especially p. 373 and authorities gathered fn. 37.[7]

In any event, even if the Court of Appeals had jurisdiction over the Unions' prior appeal from the judgment on the first cause of action, this would not affect the appealability of the order granting the new trial. The function of Rule 54(b) is to allow the district judge to im-

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7 After the Court of Appeals' decision, but prior to disposition of Richardson's motion for rehearing en banc, on December 4, 1972, the trial court made the requisite certificate and judgment was entered. The Unions then filed a new notice of appeal and perfected an appeal to the Eighth Circuit. The trial court had full authority to make the Rule 54(b) certification despite the pendency of the motion for rehearing en banc, **United States v. Crescent Amusement Company,** 323 U. S. 173, 177-178 (1944); **Ruby v. Secretary of the Navy,** 365 F. 2d 385, 389 (9th Cir. 1966). The new appeal is now being held by the Eighth Circuit pending a determination of Richardson's petition for certiorari.

part finality to an order disposing of one total judicial unit of a multiple unit case, see, 6 Moore, Federal Practice, § 54.27(2.2), pp. 325-329. In any Rule 54(b) situation, when the order final because of certification comes on to be heard in the Court of Appeals, there will be other orders of the district court which remain unappealable. If the argument for which Richardson opts is adopted, the effect of a Rule 54(b) certification would no longer be to make the single unit of the multiple unit case appealable, but would rather make the total case appealable in direct contravention of the central purpose of the rule.

Neither *Gillespie v. United States Steel Corporation*, 379 U. S. 148 (1964), nor *Green v. Wolf Corporation*, 406 F. 2d 291 (2nd Cir. 1968), cert. denied, 395 U. S. 977 (1969), upon which Richardson principally relies for his argument that if the Court of Appeals had jurisdiction over the appeal on the first claim it also had jurisdiction of the appeal from the order granting the new trial on the second claim, supports that argument. In *Gillespie*, the Court noted that the issues raised were at least arguably severable from the main case so as to come within the collateral issue doctrine, 379 U. S. 153-154. Since the issues raised were at least arguably collateral, the Court followed the lead of the Court of Appeals in declining to decide the close issue of finality, and in treating the order as final. See 9 Moore, Federal Practice, § 111.12, pp. 150-152. However, here no close question of finality is present. An order sustaining a motion for new trial is clearly nonappealable. Nor is such an order in any sense collateral to the main case. There is simply

no way of torturing this case into the collateral issue do trine of *Cohn v. Beneficial Industrial Loan Corporatio* 337 U. S. 541 (1949).

Green v. Wolf Corporation is irrelevant. In th case the Court of Appeals had jurisdiction over an appe from an order striking those parts of plaintiff's co plaint which purported to make the suit a class actio The plaintiff also attempted to appeal from a portion the trial court's order striking his prayer for puniti damages. The Court of Appeals acknowledged that had no jurisdiction over the appeal from the order stri ing the prayer for punitive damages, 406 F. 2d 302. Ne ertheless, the Court went on to pass upon the merits that order. In so doing, the Court was acting contra to the usual judicial practice of confining an opinion the issues actually before the Court. However, the Cou justified this departure from practice by a simplificati of the trial that would follow in the court below, and t importance of guidance to a lower court on punitive da age issues Securities Act litigation. Richardson, howeve seeks not instructive dicta as in *Green v. Wolf Corpor tion,* but binding appellate review, an issue to whi *Green v. Wolf Corporation* does not speak.

D.

The Court of Appeals had power to dispose of Richardson's appeal without oral argument.

This appeal was disposed of without oral argume by the Eighth Circuit pursuant to its Rule 6. Richards argues that Rule 6 is invalid. The invalidity of Rule is alleged to lie in its conflict with Rule 34 of the Feder

Rules of Appellate Procedure. However, this argument overlooks the provision of Rule 2 of the Federal Rules of Appellate Procedure that:

> "In the interest of expediting decision, or for other good cause shown, a court of appeals may except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion it may order proceedings in accordance with its direction."

The Fifth Circuit has held that this rule validates the type of pre-submission screening indulged in by the Eighth Circuit under its Rule 6, *Groendyke Transport, Inc. v. Davis,* 406 F. 2d 1158, 1161-1163 (5th Cir. 1969). This decision has been approved by the Reporter of the Advisory Committee on the appellate rules, Professor Bernard J. Ward, who states:

> "The decision is fully consistent with the spirit of Rule 2, and it is to be hoped that it will be generally followed. Rule 2 recognizes that there are times when the ordinary operation of the appellate rules will in fact impede the very purpose of the rules—the speedy, just and inexpensive determination of appeals. When this is so, Rule 2 authorizes the court of appeals to suspend the rules and to proceed as it thinks best." 9 Moore, Federal Practice, § 202.02(1), p. 603.[8]

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8 Judge Friendly informs us that "the courts of appeals already are in a state of crisis" because of the increase in the number of appeals filed in recent years, Friendly, Federal Jurisdiction: A General View, pp. 31-32. Six of the Circuits have seen pre-submission screening of appeals, and the disallowance of oral argument in certain cases,

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CONCLUSION

Richardson has attempted an appeal from a non final order. The Court of Appeals dismissed his appeal because it did not have jurisdiction, since the order was not final. Richardson has pointed to no valid reason for overturning the Court of Appeals' decision.

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as a partial answer to this crisis, see First Circuit Rule 6; Fourth Circuit Rule 7(a)(b); Fifth Circuit Rules 17, 18 and 20; Sixth Circuit Rules 3(e), 7(e), 8 and 9; Eighth Circuit Rules 6, 8 and 9; and Tenth Circuit Rules 8 and 9, and three additional circuits, without adopting a general screening process, have provided for dispensing with oral argument upon order of the court, Third Circuit Rule 12(6); Ninth Circuit Rule 3(a); D. C. Circuit Rule 11(e). While the expedition in fact imparted to the appellate process by this pre-sumission screening process may be debatable, compare Friendly, op sit., pp. 41-42; Edwards, The Avoidance of Appellate Delay, 52 F. R. D., 61, 63-65, the widespread adoption of this pre-submission screening practice indicates that many of the Circuits have found it a valuable aid in managing their dockets. If Rule 34 was designed to prevent the Courts of Appeals from adopting this useful practice, the bar would be in clearer language than that upon which Richardson founds his argument.